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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MOIRA QUINN, Plaintiff and Appellant, v. CAL FARM INSURANCE COMPANY, Defendant and Respondent.	B169281 (Los Angeles County Super. Ct. No. NC040280)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth A. White, Judge. Affirmed.

Law Office of Kari M. Myron, Kari M. Myron; Gibson & Hughes and Robert B. Gibson for Plaintiff and Appellant.

Cannon & Nelms and Derrick R. Sturm for Defendant and Respondent.

Plaintiff and appellant Moira Quinn (assignee) appeals from a summary judgment in favor of defendant and respondent Cal Farm Insurance Company (insurance company)

in this action for breach of an insurance policy and declaratory relief. Quinn is the assignee of Gary Martin (insured) under a homeowner's insurance policy issued by the insurance company. Assignee's bodily injury arose out of the use of a rented golf-cart-type vehicle on the streets of Catalina Island. We conclude the vehicle was an auto operated by insured. Thus, we conclude there is no coverage under the auto exclusion of the policy. Accordingly, we do not address whether insured was also the renter of the vehicle or whether the business activity exclusion of the policy also applies. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Underlying Facts

These facts are undisputed. Assignee and insured were both employees of EMC Corporation. On Thursday August 3, 2000, assignee, insured, and other employees attended an EMC sponsored all-day outing on Catalina Island. After lunch, assignee rented a vehicle and was joined in the vehicle by insured and Dan Clark. Assignee was the driver, insured sat in the front passenger seat, and Clark sat in the back passenger seat. As assignee was driving the vehicle down a hill, insured grabbed the steering wheel and steered the vehicle around a turn, causing the vehicle to overturn. The occupants were injured.

Assignee vs. Insured

Assignee filed a complaint against insured on August 1, 2001. Insured tendered the claim to his automobile insurer and insurance company on September 27, 2001. Insurance company rejected the claim on April 23, 2002, under the auto exclusion and the business activity exclusion. The automobile insurer defended against the complaint. On April 25, 2002, assignee and insured settled the case. On May 15, 2002, a judgment of $475,000 was entered against insured under the following conditions: the automobile

insurer paid its policy limits toward the judgment ($100,000); insured assigned its rights against insurance company to assignee; and assignee covenanted not to enforce the judgment against insured.

Complaint

On May 31, 2002, assignee sued insurance company for breach of contract and declaratory relief. She alleged there was coverage under insured's homeowner's insurance policy and neither the auto exclusion nor the business activity exclusion prevented coverage. Insurance company answered.

The Policy

The homeowner's insurance policy provides liability coverage as follows: "We will pay those sums up to the applicable Limit of Insurance [$1 million] . . . that any insured becomes legally obligated to pay as 'compensatory damages' because of 'bodily injury' . . . to which this insurance applies."

The policy contains a number of exclusions. The auto exclusion provides: "This insurance, including any duty we have to defend 'suits,' does not apply to [¶] . . . [¶] '[b]odily injury' . . . arising out of the ownership, maintenance, use, or entrustment of any . . . 'auto' . . . or other 'recreational vehicle' owned or operated by or rented or loaned to any insured. Use includes operation and 'loading or unloading.'" "'Auto' means a land motor vehicle . . . designed for travel on public roads . . . ." "'Recreational vehicle' means a motorized golf cart . . . owned by any insured and designed for recreational use off public roads."

Motions for Summary Adjudication and Judgment

Assignee moved for summary adjudication of the declaratory relief cause of action. Insurance company opposed the motion. The trial court denied the motion. Insurance company moved for summary judgment on the ground there were no triable issues of fact concerning the applicability of the auto and business activity exclusions of the policy. Assignee opposed the motion. The trial court granted the motion and entered judgment in favor of insurance company.

In support of and in opposition to the two motions, the parties submitted the deposition testimony of assignee, insured, and Clark, and answers to interrogatories of assignee and insured. The parties also submitted a copy of the vehicle rental agreement, the homeowner's insurance policy, and the court documents for the underlying case.

DISCUSSION

Standard of Review

"'A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail.' (*Molko v. Holy Spirit Assn*. (1988) 46 Cal.3d 1092, 1107.) The pleadings define the issues to be considered on a motion for summary judgment. (*Sadlier v. Superior Court* (1986) 184 Cal.App.3d 1050, 1055.) As to each claim as framed by the complaint, the defendant must present facts to negate an essential element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064-1065.)" (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic*

Richfield Co. (2001) 25 Cal.4th 826, 850.) We review orders granting or denying a summary judgment motion de novo. (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 72; *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 579.) We exercise "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

Interpretation of Insurance Policy

"[I]nterpretation of an insurance policy is a question of law." (*Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1, 18.) "'While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply. [Citation.]' [Citation.] 'The goal of contract interpretation is to give effect to the mutual intent of the parties. [Citation.] If contract language is clear and explicit, we ascertain this intent from the written provisions and go no further. [Citation.] Words in an insurance policy must be understood in their ordinary sense unless given special meanings by the policy. [Citation.]' [Citation.]" (*Golden Eagle Ins. Co. v. Insurance Co. of the West* (2002) 99 Cal.App.4th 837, 845.)

"A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable. [Citation.] But language in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract. [Citation.] Courts will not strain to create an ambiguity where none exists. [Citation.]" (*Waller v. Truck Ins. Exchange, Inc., supra*, 11 Cal.4th at pp. 18-19.)

"'An ambiguity is resolved by interpreting the provision in the sense the promisor (i.e., the insurer) believed the promisee understood it at the time of contract formation. . . . If these rules do not eliminate the uncertainty, a court must construe the applicable language against the drafter who created the uncertain language. . . . Ambiguities in

insurance contracts are generally construed in favor of coverage. [Citation.]'" (*Golden Eagle Ins. Co. v. Insurance Co. of the West, supra*, 99 Cal.App.4th at p. 845.)

Auto Exclusion

Coverage under the policy is excluded for bodily injury arising out of the use, including operation, of an auto operated by or rented to an insured. An auto is a land motor vehicle designed for travel on public roads. Assignee contends triable issues of fact exist as to whether or not the vehicle is an auto. Assignee further contends triable issues of fact exist as to whether or not insured operated the vehicle.

Insurance company presented the following evidence on the issue of whether the vehicle was an auto. Insured testified in his deposition as follows. "[I]t's a Yamaha golf cart, a four[-]passenger golf cart, meaning that it has a bench seat in front and a bench seat in the back holding an additional two passengers. It was covered. It had some sort of top cover, and there was a windshield that was made of some hard material, whether it was plexiglass or I don't know what it was made of, but there was some sort of windshield that it was equipped with. [¶] . . . [¶] . . . The other interesting thing is, you could tell that it was a legal vehicle, it was a legal vehicle for driving, because it was equipped with seat belts, which typically, for us golfers, you don't see seat belts on the golf course, but it had California plates registered to drive [on] the streets of Avalon." Insured provided the California license number of the vehicle in his answers to interrogatories. The vehicle rental receipt provided that the vehicle could only be operated by a person with a valid California's driver's license, and assignee's California driver's license number and automobile insurance company were noted on the vehicle rental receipt. The vehicle rental receipt also provided that the vehicle was to be driven only on paved roads, and a driver was required to obey all road signs and all California vehicle laws. The vehicle was driven by assignee on public roads. There was no conflicting evidence presented.

Insurance company presented the following evidence on the issue of operation of the vehicle by insured. In her deposition testimony, assignee described the accident as

follows. She was sitting in the driver's seat and was driving the vehicle. Insured encroached onto the driver's side of the vehicle and took control of the steering wheel. Insured moved assignee's foot off the accelerator with his left foot and took control of the accelerator. Assignee no longer had either of her hands on the steering wheel. She had no control. Insured caused the vehicle to speed up. Insured steered the vehicle to the left and up an embankment, and then turned the vehicle around and went down an embankment. Insured tried to make a tight turn down a path and the vehicle overturned. In his deposition testimony, insured confirmed this account of the incident except that he denied putting his foot on the accelerator.

A. Definition of Auto

Assignee contends the vehicle is not included in the policy's definition of "auto." We disagree.

Whether a vehicle is an "auto" for purposes of the automobile exclusion depends on the policy provisions and the particular facts involved. (*Alpine Ins. Co. v. Planchon* (1999) 72 Cal.App.4th 1316, 1321-1322.) Depending on factors such as time, place and use, a vehicle can satisfy common understandings of both the definition of auto and another category of vehicle. (Cf. *id*. at p. 1321 [definition of "auto" potentially overlapped with category of "mobile equipment"].) Under the terms of the insured's policy, a golf cart could be either an auto or a recreational vehicle.

However, it is clear from the undisputed facts that the vehicle driven in this case was an auto. The vehicle was designed to carry four passengers with seatbelts. It was registered to drive on the public streets of Catalina and had a California license plate. The main purpose for registering a vehicle is to use it on public streets. The car rental company required drivers to drive only on paved roads and to obey all road signs and California vehicle laws. The facts establish that the vehicle in this case was designed for

travel on public roads. In fact, assignee drove the vehicle on public roads. The trial court properly found that the vehicle was an auto under the terms of the policy.[1]

B. Operation of Vehicle

Assignee contends insured did not "operate" the vehicle. This is incorrect.

The policy does not define "operate" or "operation." Vehicle Code section 305 defines the driver of a motor vehicle as "a person who drives or is in actual physical control of a vehicle." A person who steers a vehicle, even though another person is in the driver's seat and operates the accelerator or brakes, is a "driver" within the Vehicle Code definition. (*In re Queen T.* (1993) 14 Cal.App.4th 1143, 1145.) The term "operating" is broader than driving, because operating does not require that the vehicle be in motion. (*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1028, fn. 1.)

In this case, insured actively asserted control over the vehicle. He encroached onto the driver's side and controlled the steering wheel. Assignee did not have her hands on the steering wheel. It was insured's operation of the vehicle that caused it to overturn. The trial court properly found that the vehicle was operated by insured and therefore liability was excluded under insured's homeowner's insurance policy.

Assignee contends that Insurance Code section 11580.06 limits the definition of "operated by" to the conduct of the person sitting behind the steering controls, and

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[1] We note that Vehicle Code section 345 defines a "golf cart" as "a motor vehicle having not less than three wheels in contact with the ground, having an unladen weight less that 1,300 pounds, which is designed to be and is operated at not more than 15 miles per hour and designed to carry golf equipment and not more than two persons, including the driver." Pursuant to Vehicle Code section 4019, golf carts are exempt from registration. However, registration is required under Vehicle Code section 4000 for a motor vehicle to travel on a highway or street. The vehicle in this case was designed to carry four persons and was registered to drive on public streets.

therefore, the vehicle was not operated by insured within the meaning of the exclusion.[2] However, Insurance Code section 11580.06 provides definitions for terms used in Article 2 (Actions on Policies Containing Liability Provisions), Chapter 1 (General Regulations), Part 3 (Liability, Workers' Compensation, and Common Carrier Liability Insurance) of the Insurance Code. (*State Farm Fire & Cas. Co. v. Camara* (1976) 63 Cal.App.3d 48, 51.) Other sections of Article 2 set forth provisions required to be included in automobile liability policies and some of those required provisions contain the term "operated by." Article 2 does not require any provisions that contain the term "operated by" to be included in any homeowner's insurance policy. Therefore, the statutory definition of "operated by" does not govern the meaning of a term in an exclusion in a homeowner's insurance policy.[3]

C. Conclusion

Insured's homeowner's insurance policy excluded from its liability coverage, liability for bodily injury arising out of the use of an auto operated by the insured. Since insured operated an auto and this operation gave rise to assignee's bodily injury, the auto exclusion of insured's homeowner's insurance policy applies and there is no coverage under the homeowner's insurance policy.

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[2] Insurance Code section 11580.6 provides in pertinent part: "Except as may be otherwise provided in this article: [¶] . . . [¶] (f) The term 'operated by' or 'when operating' shall be conclusively presumed to describe the conduct of the person sitting immediately behind the steering controls of the motor vehicle. The person shall be conclusively presumed to be the sole operator of the motor vehicle."

[3] We note that in 1984, the Legislature amended Insurance Code section 11580.06 to add a definition of "use" of a motor vehicle as limited to "operating, maintaining, loading, or unloading" the motor vehicle. As noted above, Insurance Code section 11580.06 defines "operated by" to conclusively presume to describe the conduct of the person sitting immediately behind the steering controls of the motor vehicle. The amendment clarified that the definition of "use" in automobile policies did not include mere entrustment of a vehicle. (*Ohio Farmers Ins. Co. v. Quin* (1988) 198 Cal.App.3d 1338, 1348-1349.)

DISPOSITION

The judgment is affirmed. Cal Farm Insurance Company is awarded its costs on appeal.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.